(2)

No. 91-434

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and JOHN QUINCY ADAMS, on behalf of themselves and all others similarly situated,

Appellants

vs.

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, and DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, members of the State Board of Election Commissioners, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE, and REPUBLICAN PARTY EXECUTIVE COMMITTEE,

Appellees,

and THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE, TIM FORD, in his official capacity as Speaker of the House of Representatives; GLENN S. DeWEESE, in his official capacity as President Pro Tempore of the Mississippi Senate; and THE STANDING COMMITTEE OF APPORTIONMENT AND ELECTIONS OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES,

Appellees-Intervenors.

On Appeal From Decisions Of The Three-Judge Court Of the United States District Court For the Southern District Of Mississippi

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court lack jurisdiction over this appeal because: (a) the district court's denial of injunctive relief did not rest upon resolution of the merits of appellants' constitutional claim, or (b) the appeal is moot.

2. In the face of imminent elections and in the absence of an enforceable legislative reapportionment plan, may a three-judge district court permit interim legislative elections for a limited term of office to proceed under an existing malapportioned plan?

3. Did the district court abuse its discretion in declining to issue a preliminary injunction under § 2 of the Voting Rights Act because appellants failed to establish the necessary elements for a preliminary injunction, where the court declared that the existing plan would be retained only for a single election for a limited term of office?

4. Was the district court correct in concluding that its order temporarily altering certain provisions of Mississippi election law on an emergency basis did not require preclearance under §5 of the Voting Rights Act because: (a) its factual finding that alterations did not reflect the policy choice of elected officials was not clearly erroneous; (b) equitable principles excused the need for preclearance in the exigent circumstances of this case; or (c) the alterations had no potential for discrimination.

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Appellees.

On Appeal From Decisions of the Three - Judge Court of the United States District Court for the Southern District of Mississippi

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APPELLEES' MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, the appellees move to dismiss this appeal or, alternatively, to affirm the judgment of the three-judge district court below. This motion is based on the grounds that (1) this court lacks jurisdiction; (2) the district court, exercising its equitable powers, did not abuse its discretion; (3) the district court's ruling is based on very specific and restricted facts which are unique to this case and which will have no far-reaching implications on Voting Rights Act cases nationwide; and (4) the decision of the district court is eminently correct so as to warrant no further review.

STATEMENT OF THE CASE

A. The Apportionment Plan

In anticipation of the convergence of the 1990 census and the 1991 state and county elections, the Mississippi Legislature, in 1989, changed the state election schedule to permit the legislature and counties to redistrict and obtain approval under Section 5 of the Voting Rights Act so that elections could be held.[1] The new election time frame was established as follows: (A) July 19, 1991: deadline for qualifying for elective office, Miss. Code Ann., § 23-15-359 (Supp. 1990); (B) September 17, 1991: party primary elections, Miss. Code Ann., § 23-15-191 (Supp. !990); and (C) November 5, 1991: general election, Article 4, § 140, Mississippi Constitution of 1890. This new election schedule received § 5 of the Voting Rights Act approval and became effective on June 28, 1989.

The State of Mississippi received the 1990 decennial census data on January 31, 1991, and on April 30, 1991, the Mississippi Legislature adopted reapportionment plans for its House and Senate. On May 10, 1991, the United States Attorney General received, for review under § 5 of the Voting Rights Act, the 1991 legislative reapportionment plan, and on July 2, 1991, the United States Attorney General interposed an objection to the 1991 legislative reapportionment plan.

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[1] The following elective offices are filled every four years and are involved in this year's elections: Governor, Lieutenant Governor, Secretary of State, Attorney General, Auditor of Public Accounts, three public service commissioners, three highway commissioners, Commissioner of Insurance, Commissioner of Agriculture, Senators and members of the House of Representatives, twenty district attorneys, clerks of the circuit and chancery courts of the several counties, as well as sheriffs, coroners, assessors, surveyors, and members of the board of supervisors of the various counties, justice court judges and constables. *See* Miss. Code Ann., § 23-15-193 (Supp. 1990).

On June 28, 1991, the appellants filed a civil action in the district court challenging Mississippi's current legislative apportionment (1982 plan) as well as the 1991 plan. Appellants sought injunctive and other relief under §§ 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*, and the Fourteenth and Fifteenth Amendments to the United States Constitution. The appellants, however, did not serve process on the appellees until July 8, 1991.

After a hearing on July 15, 1991, the three judge district court, *inter alia*: enjoined the July 19, 1991, legislative qualifying deadline; requested recommendations for special master or expert witness; directed parties to file their proposed redistricting plans on or before July 22, 1991, and set the matter for hearing on July 29, 1991.

Only the appellants and the appellees-intervenors (members of two legislative committees) presented the lower court with plans. All plans were examined by the court appointed expert witnesses, who were very critical of all proposed plans, J.S. App. 21-22,[2] and concluded that none of the plans cured the United States Attorney General's §5 objections based on discriminatory purpose, J.S. App. 22.

The district court found serious problems with all of the submitted plans in that: (1) all plans have districts that were not compact, J.S. App. 33;[3] (2) non-compact districts con-

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[2] J.S.___, refers to the Appellants' Jurisdictional Statement and the appropriate page.

[3] The district court described some of the non-compact districts as: "pinwheel", "barbell", "boomerang", "amoeba-like", "half-oval", "narrow alley", "narrow arms shooting out", "bizarrely configured", "octopus like", "oddly-configured", "sickle-shaped", and "dumbbell". J.S. App. 33 n. 11 and n. 12; J.S. App. 34 n. 13.

tained in all of the plans indicated "political, not merely racial, jockeying in configuring these districts," J.S. App. 34; (3) the settlement plan submitted by appellants and the Joint Committee contained changes "for the purpose of defeating a member, or members, of the rival House Committee", J.S. App. 35; (4) the July 11 House Committee plan also contained changes "for pure political reasons", *id.*; (5) appellant/legislator Ed Blackmon testified that power politics was involved in all the plans presented to the Court; that "no clean hands" were involved in the legislatively drawn 1991 plan; and, that compactness had not been honored in drawing the districts, J.S. App. 23-24; (6) "the troubling political winds that have unfailingly roared through this courtroom at every turn of this litigation" . . . are warning lights for any plan" and "sounds an alarm," J.S. App. 29.

The district court concluded:

> The Court is reluctant to adopt, even on an interim basis, any of the plans so filled with little disguised political "landmines". J.S. App. 34.

The district court found that all the plans submitted split a large number of precincts, J.S. App. 23, 35, and that the existing 1982 plan only split 20 precincts for the House and 4 precincts for the Senate, J.S. App. 10.

The district court found that:

> [U]sing the existing law (the 1982 plan) will require splitting fewer precincts than would be required by any of the plans submitted. This Court is wary of the great potential for voter confusion caused by use of any of the submitted plans. J.S. App. 35-36.

Because the district court utilized "the 1982 plan only for interim relief" and "is not adopting, or utilizing, the 1982 plan as a permanent plan", J.S. App. 45-46, the district court found that appellants did not satisfy "the test for preliminary relief" under § 2 of the Voting Rights Act, J.S. App. 46. The district court observed that where corrective relief was available at a later date, the establishment of a Voting Rights Act violation would not merit a preliminary injunction. J.S. App. 46 n.16.

The district court concluded:

> [T]he legislative districts under the 1982 plan are doubtless unconstitutionally malapportioned for a full four year term of office, this court, exercising its equitable powers, holds that under the facts in this case, including the imminent elections, they may be constitutionally utilized for interim relief. J.S. App. 50-51.

The district court acknowledged that it "is not abdicating its responsibility to enforce the provisions of the Voting Rights Act and the constitutional requirements of one-person, one vote," J.S. App. 51, but "conclude[d] that conducting elections under the existing plan is the lesser of the available evils." J.S. App. 51. The three judge court retained jurisdiction; required the parties to submit nominees for a special master by February 14, 1992; and, set a status conference for March 2, 1992, J.S. App. 27.

B. Temporary Changes In State Election Procedures

On July 30, 1991, the district court directed the Mississippi Attorney General to produce a sampling of circuit clerks and election commissioners to provide testimony concerning problems that they could encounter if the Court permitted the 1991 legislative election to proceed.

District court testimony on July 31 illustrated the necessity for altering certain election procedures because of the court's extension of the qualifying deadline for legislative candidates, leaving less than the usual period of time to prepare for the conducting of the September 17 primary. J.S. App. 55.

At a status conference held on July 22, 1991:

> Wilbur Colom, one of the attorneys for the plaintiffs, suggested to the Court that special procedures would be necessary in order to hold elections on September 17, 1991. He further suggested that the Democratic and Republican Party Executive Committees should make a proposal to the Court in that regard. J.S. App. 75.

It was in this light, and only after hearing testimony concerning election procedure difficulties, that the district court requested the parties to make one submission to the trial court concerning "the language" the parties would like to see in the Court's order with respect to modification of election procedures.

Mr. Warren, counsel for appellee Democratic Party,

> asked Mr. Colom, counsel for the plaintiffs, if he would like to make any suggestions on behalf of his clients.
>
> * * *
>
> Mr. Colom did, in fact, provide a handwritten list of proposed election changes to me for inclusion in our submission to the Court. J.S. App. 76.

The appellants' suggestions were reviewed by a staff attorney for the Secretary of State, made available to provide technical assistance on election procedures, who determined that only two (2) of the appellants suggestions could be implemented without "any significant difficulties." J.S. App. 83. These two suggestions of the appellants were incorporated into the document entitled "Proposed Language for Court's Order" which was filed with the lower court on August 1, 1991. The items listed in this proposal reflected the testimony of needed changes due to the capsulated election schedule.

On August 2, the district court entered its order which contained certain temporary alterations in election procedures. These election alterations were only applicable to the September 17 first primary; these alterations were not used in the October 8 second primary, nor will they be used in the November 5 general election or in any future election. J.S. App. 6.

It was not until after this Court denied appellants' application for a stay and injunction, J.S. App. 57, that they sought in the district court a preliminary injunction under §5 invalidating the temporary election procedures contained in the district court's August 2 order. The district court was surprised by the appellants' motion because "the plaintiffs' counsel, Wilbur Colom, was a primary source of the 'changes' which plaintiffs now challenge." J.S. App. 55.

The district court denied appellants' motion stating that its "determination regarding the necessity of changes in certain election procedures . . . was based in large part on the testimony" of witnesses, J.S. App. 55, and because "the parties -- including appellants -- were permitted to make suggestions . . . does not suggest the conclusion that the order reflects 'policy choices of . . . elected representatives.'" *Id.*

The appellants thereafter filed another application for a stay and injunction with this Court which was denied by Justice Scalia on September 16, 1991, Application No. 204.

ARGUMENT

I. THIS COURT SHOULD DISMISS APPELLANTS' APPEAL.

A. Because The District Court's Denial of Injunctive Relief Did Not Rest Upon Resolution Of The Merits Of Appellants' Constitutional Claim, This Court Lacks Jurisdiction To Entertain Their Appeal Under 28 U.S.C. §1253.

In *MTM, Inc., v. Baxley*, 420 U.S. 799 (1975), this Court squarely held:

> [A] direct appeal will lie to this Court under §1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.
>
> *Id.*, at 804.

Here, appellants assail the district court's failure to grant them injunctive relief, claiming that "the district court found the designated plans to be unacceptable on the grounds other than constitutional and statutory considerations." J.S. 8. The indisputable truth of this assertion requires the dismissal of appellants' appeal under *MTM*.

MTM, the owner of the Pussycat Adult theatre in Birmingham, had been the target of an action in state court by Alabama officials to enjoin its operations for violations of local obscenity laws. *MTM* retaliated by filing an action to enjoin the enforcement of those statutes, and a three-judge district court was convened under 28 U.S.C. § 2281, since repealed. Act of Aug. 12, 1976, Pub. L. 94-381, §1, 90 Stat. 1119. The district court did not reach the merits of the claim, but dismissed the complaint without prejudice in view of the pending state proceedings, under *Younger v. Harris*, 401 U.S. 37 (1971). *MTM* appealed to this Court under § 1253. 420 U.S. at 799-801.

In holding that § 1253 does not grant jurisdiction over an appeal from the denial of an injunction on grounds other than the merits of the claim, this Court quoted the reasoning of its earlier decision in *Gonzales v. Employees Credit Union*, 419 U.S. 90 (1974):

> ... While issues short of the merits -- such as justiciability, subject-matter jurisdiction, equitable jurisdiction, and abstention -- are often of more than trivial consequence, that alone does not argue for our reviewing them on direct appeal. Discretionary review in any case would remain available, informed by the mediating wisdom of a court of appeals. Furthermore, the courts of appeals might in many instances give more detailed consideration to these issues than this Court, which disposes of most mandatory appeal in summary fashion. 419 U.S., at 99.
>
> 420 U.S. at 803.

This Court reasoned that the lack of mandatory jurisdiction over denials of injunctions in such circumstances was consistent with congressional policy:

> It is certain that the congressional policy behind the three-judge court and direct-review apparatus -- the saving of state and federal statutes from improvident doom at the hands of a single judge -- will not be impaired by a narrow construction of §1253. A broad construction of the statute, on the other hand, would be at odds with the historic congressional policy of minimizing the mandatory docket of this Court in the interest of sound judicial administration.
>
> *Id.*, at 804.

For this reason, the Court concluded that jurisdiction would attach under § 1253 "only where such order [denying injunctive relief] rests upon resolution of the merits of the constitutional claim presented below." *Id.*

Although *MTM* has been criticized by commentators, 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 1440 at 152-53 (2d ed. 1988), Congress has not seen fit to amend § 1253. This reluctance can hardly stem from lack of attention to this Court's appellate jurisdiction. As already noted, § 2281 was repealed the year after *MTM* was decided, and 28 U.S.C. § 1252, which permitted direct appeals to this Court from decisions invalidating acts of Congress, was repealed in 1988. Act of June 27, 1988, Pub. L. 100-352, §1, 102 Stat. 662. Through all of this legislative activity, § 1253 has stood precisely as this Court interpreted it in *MTM*.

Invoking this Court's jurisdiction under § 1253, appellants assert, "This is a direct appeal from orders denying preliminary injunctions issued by a three-judge district court for the Southern District of Mississippi on August 2, 1991; August 9, 1991; and August 30, 1991." J.S. 1. Appellants properly characterize their appeal, because the district court's order of August 2 permitted the 1991 elections to proceed under "the

apportionment plan now in effect (1982 plan), Miss. Code Ann., § 5-1-1 (Supp. 1990), *et seq.*" J.S. App. 5.[4] The district court's refusal to disturb Mississippi law did not "rest[] upon resolution of the merits of the constitutional claim," MTM, supra, 420 U.S. at 804; on the contrary, its opinion of August 9 makes plain that "the legislative districts under the 1982 plan are doubtless unconstitutionally malapportioned for a full-four year term of office." J.S. App. 50. Relying upon the equitable discretion recognized by this Court in *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), and *Ely v. Klahr*, 403 U.S. 108, 113 (1971), J.S. App. 39-41, the district court, "exercising its equitable powers," J.S. App. 50, permitted the election to proceed under existing law. Of course, this Court expressly recognized in *MTM* that the exercise of "equitable jurisdiction" is an issue that should be appealed to the court of appeals, 420 U.S. at 803, quoting *Gonzales, supra*, 419 U.S. at 99. Under the plain teaching of *MTM*, then, this Court lacks jurisdiction to entertain appellants' appeal.[5]

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[4] Arguably, pararagraph 5 of the August 2 order, J.S. App. 6-7, grants an injunction, although appellants do not so characterize it, because it alters certain details of Mississippi election law for purposes of the September 17 first primary. Regardless of its proper characterization, appellants' challenge to pararagraph 5 of the order, set forth in Argument III of their Jurisdictional Statement, is moot because the primary is over, as demonstrated hereafter in Part I.B of this Motion.

[5] The only arguable distinction between *MTM* and this case is that the district court's jurisdiction here is based upon 28 U.S.C. §2284(a), requiring a three-judge court "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." This provision was adopted by the same Congress which repealed §2281, which provided for a three-judge court to consider any challenge to the constitutionality of a state statute. Act of Aug. 12, 1976, Pub. L. 94-381, §3, 90 Stat. 1119. There is no reason to suppose that Congress intended more liberal appeals from denials of injunctive relief by courts convened under §2284(a) than from their predecessors convened under §2281. On the contrary, it defies a rudimentary

B. Appellants' Appeal Should Be Dismissed As Moot, Because The September 17 First Primary Has Already Been Conducted.

Ordinarily, where, as here, an appellant has mistakenly taken an appeal to this Court under § 1253, this Court vacates the district court's order "so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals." *MTM*, *supra*, 420 U.S. at 804 (footnote omitted). In this case, however, any such "fresh order" would be an exercise in futility, as the September 17 first primary has already been conducted. The issues presented by appellants in their appeal are therefore moot, and their appeal should simply be dismissed.

This Court has often been faced of the necessity of deciding appeals from election disputes after the conduct of the elections which originally gave rise to the controversy. As a general rule, such cases have been dismissed as moot unless "it is reasonable to expect that the same controversy will recur between these two parties, yet evade meaningful judicial review." *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988), citing *First National Bank v. Bellotti*, 435 U.S. 765, 774-75 (1978), and *Moore v. Ogilvie*, 394 U.S. 814 (1969). While the proper application of this principle has been difficult to discern in particular circumstances, it seems clear that, where an election is over and the claimed violations are not likely to recur, the appeal should be dismissed.

The difference between the two classes of election disputes is aptly illustrated by *Illinois State Board of Elections v.*

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appreciation of human nature to suppose that Members of Congress would have wished to encourage expedited appeals from court orders permitting them to run for re-election in the districts from which they had already been elected.

Socialist Workers Party, 440 U.S. 173 (1979). The Party had sued the State Board and the Chicago Board of Elections to invalidate an Illinois Statutory scheme which required a qualifying petition bearing signatures of 5% of those who voted at the previous election for local offices in Chicago even though petitions for statewide elections required only 25,000 signatures. The district court found the distinction irrational, and "permanently enjoined the enforcement of the 5% provision insofar as it mandated more than 25,000 signatures, the number required for statewide elections." *Id.*, at 179. The Court also approved a settlement between the Party and the Chicago Board, applicable only to the special mayoral election of 1977, which reduced the signature requirement to 20,000 and extended the filing deadline. Id., at 180. The State Board appealed the permanent injunction on its merits and challenged the authority of the Chicago Board to enter into the settlement regarding the 1977 election. After the election was held, the Seventh Circuit affirmed the permanent injunction and dismissed as moot the State Board's challenge to the Chicago Board's authority. *Id.*

This Court affirmed the granting of permanent relief and affirmed the finding that the appeal from the special provisions for the 1977 election was moot. It rejected the State Board's argument that the dispute was "capable of repetition, yet evading review," within the meaning of *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). The Court reasoned:

> In *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), we elaborated on this exception, holding that a case is not moot when:
>
> > (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or

> expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.
>
> Although the first branch of the test is satisfied here, appellant has presented no evidence creating a reasonable expectation that the Chicago Board will repeat its purportedly unauthorized actions in subsequent elections.... The Chicago Board's entry into a settlement agreement reflected neither a policy it had determined to continue . . . nor even a consistent pattern of behavior .... (citations omitted).

440 U.S. at 187-88. *Accord*, *Hall v. Beals*, 396 U.S. 45, 48 (1969).[6]

Appellants' appeal from paragraph 5 of the District Court's August 2 order, J.S. App. 6-7, as modified by its August 30 order, J.S. App. 56, as set forth in Argument III of their Jurisdictional Statement, is plainly moot under the rule of *Illinois State Board of Elections*. Paragraph 5 altered certain election procedures because of the court's extension of the qualifying deadline, leaving less than the usual period of time to prepare for the conduct of the election. Even if appellants were correct in their assertion that paragraph 5 reflects the

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[6] This rule has been consistently followed by the courts of appeals to dismiss appeals concerning claims peculiar to past elections which are not likely to be repeated. *See, e.g., McCrary v. Poythress*, 638 F.2d 1308, 1310 & n.1 (5th Cir. 1981) (affirming finding of mootness where "the defendants had conceded an error and abandoned the request for the reports" under the Georgia Campaign and Financial Disclosure Act); *Dean v. Austin*, 602 F.2d 121, 124 (6th Cir. 1979) (dismissing appeal as moot where "Michigan election officials may have made mistakes in the instructions pertaining to" the casting of ballots for minority parties, but "there is no reason to believe from this record that any inadequacy of the ballot instructions in 1978 will be repeated in future elections").

policy choices of defendants, J.S. 21, there is no indication that it reflects "a policy [defendants] had determined to continue" or "even a consistent pattern of behavior." *Illinois State Board of Elections, supra,* 440 U.S. 188. Paragraph 5 was enforced only in the September 17 first primary; it was not enforced in the October 8 second primary, nor will it be enforced in the November 5 general election or any general election thereafter. Appellants' appeal from paragraph 5 must therefore be dismissed as moot.

In Arguments I and II of their Jurisdictional Statement, appellants argue that the district court's decision to permit the 1991 election to be conducted under existing law violates the one-person-one-vote principle of the Fourteenth Amendment and "results in a denial or abridgement of the right . . . to vote on account of race or color" in violation of § 2 of the Voting rights Act, 42 U.S.C. § 1973. Whatever the merits of these claims, it is not "reasonable to expect that the same controversy will recur between these two parties, yet evade meaningful judicial review." *Meyer,* 486 U.S. at 417 n.2. On the contrary, the district court explicitly stated:

> [T]his court is not abdicating its responsibility to enforce the provisions of the Voting Rights Act and the constitutional requirement of one-person, one-vote. Far from it. We have retained jurisdiction of this action. We would not consider -- nor would the parties suggest -- use of the 1982 plan if we were implementing a permanent plan. J.S. App. 51.

Paragraph 3 of the August 2 order makes plain that the next legislative election, whenever it is held, will not be conducted under the same plan:

> 3. Those persons elected to 1991 legislative elections shall hold office until their successors are elected

> under an apportionment plan which complies with the Voting rights Act and the United States and Mississippi Constitutions. That plan will be effected either by (a) a legislative plan, precleared by the United States Attorney General or approved by a three-judge court in the District of Columbia, 42 U.S.C. §1973c, or (b) ordered by this court. J.S. App. 5.

The district court's recognition that "the legislative districts under the 1982 plan are undoubtless unconstitutionally malapportioned for a full four-year term of office," J.S. App. 50, makes plain that the next election will be held as soon as an acceptable plan can be devised. Indeed, paragraph 4 of the August 2 order, J.S. App. 5-6, commits the district court to begin work on such a plan on February 14, 1992.

Both of the first two questions presented for review by appellants, J.S. i, ask this Court only to address the standards for "interim" orders in redistricting cases. However, the interim order which appellants seek to appeal has already done its work, and the district court has announced its intention to enter a permanent order at an early date. There is no reason in this world for this Court to expend its energy expounding upon interim orders, when the election governed by this interim order has already been held, and no other interim orders are contemplated by the district court. The constitutional and statutory arguments which appellants seek to adjudicate may more properly be presented upon appeal from the permanent injunction forthcoming from the district court, should they be dissatisfied with the result.

Because only this appeal, and not appellants' complaint for permanent injunctive relief, has become moot, there is no need to vacate the orders of August 2 and 30. As the Seventh Circuit has explained in a similar situation:

> As a general rule, when a case becomes moot on appeal, the district court's decision is vacated in order to make sure that a decision that the loser was unable to get appellate review of does not have res judicata or collateral estoppel effect in subsequent litigation between the parties.... This case is different, however, in that the case has not become moot -- only one order in the case has become moot, the preliminary injunction under appeal -- and in such cases the usual practice is just to dismiss the appeal as moot and not vacate the order appealed from.... A preliminary injunction has no preclusive effect -- no formal effect at all -- on the judge's decision whether to issue a permanent injunction.
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> *Gjertsen v. Board of Election Commissioners*, 751 F.2d 199, 202 (7th Cir. 1984).

Because a vacation of the district court's orders of August 2 and 30 would have no practical effect whatsoever, this Court should simply dismiss appellants' appeal.

II. IN THE ALTERNATIVE, THIS COURT SHOULD AFFIRM THE ORDERS OF THE DISTRICT COURT.

A. Standard of Review

In considering the merits of appellants' contentions on appeal, this Court must keep in mind the standard of review of interlocutory appeals under §1253. In *Brown v. Chote*, 411 U.S. 452 (1973), a three-judge district court had granted a preliminary injunction requiring the State of California to place plaintiff on the ballot for a seat in Congress, notwithstanding his failure to pay the filing fee. Considering the appeal from that preliminary injunction, this Court stated:

> In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion. *Alabama v. United States*, 279 U.S. 229 (1929); *United States v. Corrick*, 298 U.S. 435 (1936); *United Fuel Gas Co. v. Public Service Comm'n of West Virginia*, 278 U.S. 322 (1929); *National Fire Insurance Co. of Hartford v. Thompson*, 281 U.S. 331 (1930).
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> 411 U.S. at 457.

The same standard of review applies where a preliminary injunction is denied; except for *Corrick, supra,* each of the cases cited by this Court as authority in *Brown* involved the denial of a preliminary injunction. Moreover, as the Fifth Circuit has noted, "The abuse of discretion standard is as applicable in civil rights cases as in any other . . . ." *Allen v. Mississippi Comm'n of Law Enforcement,* 424 F.2d 285, 290 (5th Cir. 1970).

It is not enough for an appellant to show that he may be entitled to relief on the merits. As this Court said in *Alabama v. United States, supra,* "the duty of this court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits, but simply to determine whether the discretion of the court below has been abused." 279 U.S. at 231. In evaluating the district court's exercise of its discretion, it is appropriate to consider the public interest, even where the appellants will undisputably prevail on the merits.

Here, the district court properly took the public interest into account. As the district court explained:

> If the 1982 plan can be used, its use will help alleviate voter confusion, help to insure adequate time to

> prepare for the elections, and otherwise enhance those elections. For example, if under a plan other than the 1982 plan, a voter does not know where the polling place is for the elections, it is quite conceivable that the voter will arrive to vote at the wrong polling place at or about the time the polls are closing, only to find that under the new, short-lived plan, he or she is to vote at another place, with the result that time does not permit doing so. Elections are for the voters; it is their opportunity to elect their representatives in the Mississippi Legislature. This court finds that its concerns about the otherwise unacceptable population deviations in certain districts under the 1982 plan are far outweighed by the benefits to the voters in these elections. J. S. App. 43.

Whatever the merit of appellants' claims, the district court did not abuse its discretion in finding them to be outweighed by its articulated consideration of the public interest. Its orders should therefore be affirmed.

B. In The Face Of Imminent Elections And In The Absence Of An Enforceable Legislative Reapportionment Plan, The District Court Correctly Permitted Interim Legislative Elections For A Limited Term Of Office To Proceed Under An Existing Malapportioned Plan.

This Court has repeatedly authorized district courts to utilize their equitable powers to permit elections to be held under existing plans which did not comport with constitutional or legal requirements when district courts, such as here, were faced with exigent circumstances, impending elections, and

the absence of an acceptable alternative plan. *Upham v. Seamon*, 456 U.S. 37 (1982); *Bullock v. Weiser*, 404 U.S. 1065 (1972); *Whitcomb v. Chavis*, 396 U.S. 1055 (1972); Ely v. Klahr, 403 U.S. 108 (1971); *Reynolds v. Sims*, 377 U.S. 533 (1964).[7]

The district court, following the teachings of this Court, stated:

> [T]his court both finds, as a matter of fact, and holds as a matter of law, that none of the plans submitted by the parties can be utilized for the 1991 legislative elections. Furthermore, there is insufficient time for this court to prepare and adopt its own plan and still hold the 1991 legislative elections. J.S. App. 4[8]

The district court recognized that utilization of the 1982 plan for the 1991 elections resulted in total population deviations that were unacceptable, J.S. App. 44. However, the district court found that "the deviations in most districts are acceptable, especially for this interim election." J.S. App. 43. Relying on *Chapman v. Meier*, 420 U.S. 1, 24 (1975), the district court concluded that the facts present in this case presented acceptable considerations that would justify an election under a plan that deviated from the one-person, one-vote requirements. J.S. App. 45.

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[7] The district court noted that "[t]he situation facing this Court is analogous to that in *Ely*." J.S. App. 41.

[8] Because the entire 1991 plan did not receive § 5 approval, J.S. App. 158, the legislative plan in existence prior to the 1991 plan continued as the state's legislative apportionment plan, i.e. the 1982 plan. The 1982 plan received § 5 approval and became effective on November 2, 1982. By leaving that plan temporarily in place the district court deferred to state policy, as much as possible, as *Upham v. Seamon*, 456 U.S. 37, requires.

The district court specifically found that "the legislative districts under the 1982 plan are doubtless unconstitutionally malapportioned for a full four-year term of office," J.S. App. 50; required the parties to submit nominees for a special master by February 14, 1992, J.S. App. 27; and set a status conference for March 2, 1992, J.S. App. 27. Clearly, the district court intends to promptly establish "an apportionment plan which complies with the Voting Rights Act and the United States and Mississippi Constitution." J.S. App. 51.

Relying upon the equitable discretion recognized by this Court in *Reynolds v. Sims, supra,* and *Ely v. Klahr, supra,* J.S. App. 31-41, the district court, exercising its equitable powers, J.S. App. 50, permitted the legislative elections to proceed under the existing 1982 plan. Appellants have not submitted a substantial issue and have not demonstrated any abuse of discretion by the district court. *Brown v. Chote, supra.*

C. Appellants Are Not Entitled To A Preliminary Injunction Under Section 2 Of The Voting Rights Act Unless They Satisfy The Elements For A Preliminary Injunction.

The district court did not hold, as appellants contend, "that §2 of the Voting Rights Act does not apply to interim court-adopted or court-approved apportionment schemes", J.S. 20. The district court did, however, find that appellants did "not satisfy the test for preliminary relief," J.S. App. 46.

The interim relief granted below was not a court ordered plan, but merely was an equitable determination by the lower court that the current legislative plan, *i.e.* the 1982 plan, would be utilized for the 1991 scheduled legislative elections. The

appellants in the district court sought a preliminary injunction under Section 2 of the Voting Rights Act to enjoin the 1991 elections from being conducted under the 1982 plan. The lower court denied their motion,[9] and held:

> [W]e need not reach the issue of the 1982 plan's invalidity under §2, because we are utilizing the 1982 plan only for interim relief, pending adoption of a plan that meets the requirements of the Constitution and the Voting Rights Act. We hold that because this Court is not adopting, or utilizing, the 1982 plan as a permanent plan but for an interim period, plaintiffs do not satisfy the test for preliminary relief. (footnote omitted) J.S. App. 45-46.

In the footnote to the above comments, the district court cited the case of *Chisom v. Roemer,* 853 F.2d 1186 (5th Cir. 1988) for the proposition that even if a § 2 violation is proven, it does not follow that irreparable injury has been suffered, because the availability of corrective relief at a later date exists.[10]

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[9] Appellants offered no proof below that the current (1982) apportionment plan was adopted or maintained with the intent to discriminate against minority voters. *Mobile v. Bolden,* 446 U.S. 55(1980). In fact, this was the first time a §2 or any other type of challenge has been made to the 1982 apportionment plan.

[10] The appellants also failed to prove a substantial likelihood of prevailing on the merits. *Thornburg v. Gingles,* 478 U.S. 30, 59 n.28 (1986) emphasized that "when considering several specific vote dilution claims in a single case, courts must not rely on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district." The testimony of appellants' witnesses concerning the three part test for §2(b), *inter alia,* Dr. Lichtman, J.S. App. 92-121, and Henry Kirksey, J.S. App. 137-139, was not "district specific" but was based "on data aggregated from . . . the challenged districts". Specific proof is required to establish political cohesiveness; just because racial polariza-

Appellants have not and cannot demonstrate irreparable harm. The district court fashioned interim relief for the 1991 legislative elections and made it extremely clear that its use of the 1982 plan would be "doubtless(ly) unconstitutionally malapportioned for a full four-year term of office". J.S. App. 50. However, the district court retained jurisdiction of this matter, established dates for the parties to submit nominees for the appointment of a special master, and set a status conference for March 2, 1992. J.S. App. 27. Beyond peradventure, it is clear that the district court has charted an expeditious course for creating a permanent legislative apportionment plan and will require special legislative elections under a permanent plan that satisfies "the Voting Rights Act and the United States and Mississippi Constitutions." J.S. App. 51. "'The possibility that . . . other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.'" *Sampson v. Murray*, 415 U.S. 61, 70 (1974) (quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 104 U.S. App. D.C. 106, 110, 259 F.2d 921, 925 (1958)).

Further, "[o]nly when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief". Wright & Miller, *Federal Practice and Procedure* § 2948 at 431-34 (1973). Appellants have not demonstrated how any threatened harm would preclude the district court from ultimately granting an effective permanent remedy. "[B]ecause the district court's plan is only an interim plan and is subject to replacement... the injury to appellants,

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tion in voting has occurred, that is not synonymous with political cohesiveness. *Monroe v. City of Woodville*, 881 F.2d 1327, 1331 (5th Cir.), modified on rehearing 897 F.2d 763 (5th Cir.), *cert. denied*, ___U.S.___, 111 S.Ct. 71 (1990). The proof before the court concerning how "geographically compact" minority single member districts could be drawn, as required by *Thornburg*, 478 U.S. at 50, was also insufficient. J.S. App. 21-22.

if any, will not be irreparable." *Upham v. Seamon,* 456 U.S. 37, 44 (1982).

Clearly, the district court did not rule "that §2 of the Voting Rights Act of 1965 does not apply to interim court- adopted or court-approved apportionment schemes", J.S. 20, as appellants incorrectly suggest to this Court. The plain fact is that appellants did not meet the four part test necessary for a preliminary injunction. The district court did not abuse its discretion, *Brown v. Chote, supra;* this issue is not substantial; and the issue is definitely not of national concern.[11]

D. The Election Changes In The August 2 Order Do Not Reflect Policy Choices Of Elected Representatives.

On August 2, 1991, the lower court entered its order establishing the methods by which the September 17 primary elections would be conducted. J.S. App. 2. On August 20, 1991, appellee Democratic Party filed a Motion for Clarification of Order in the lower court to which the appellants objected and filed a Motion for a Preliminary Injunction under §5.

In denying the appellants' Motion for Preliminary Injunction the Court initially noted that appellants:

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[11] Appellants' reliance on *Edge v. Sumter County School District,* 775 F.2d 1509 (11th Cir. 1985), J.S. 16, 19, is misplaced. In Edge, the district court ignored §2 and drew a permanent election plan, while here the district court merely denied a preliminary injunction because appellants failed to meet the necessary criteria. The district court did hold that a permanent plan must comply with the Voting Rights Act. J.S. App. 51.

> at no time prior to the filing by the Democratic Party for Clarification, raised nor even intimated any [§5] objection to the specific terms of the Court's order setting forth the methods by which the primary elections would be conducted. J.S. App. 54, 55.

The district court was further surprised by appellants now challenging the election procedures because:

> [P]laintiffs' counsel, Wilbur Colom, was a primary source of the 'changes' which plaintiffs now challenge. J.S. App. 55.[12]

The three-judge district court then answered the pertinent question as to whether the changes contained in its August 2 order reflect the "policy choice of . . . elected representatives" stating:

> The court's August 2 order provides *interim relief*. The court's determination regarding the necessity of changes in certain election procedures for the purpose of assuring that elections would be conducted in a timely and orderly fashion was based in large part on the testimony of Wayne Parker . . .
>
> * * *
>
> That the parties -- including plaintiffs -- were permitted to make suggestions to the court regarding provisions of the court's order does not suggest the conclusion that the order reflects "policy choices of . . . elected representatives". (emphisis in original). J.S. App. 55.

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[12] See cross-examination of Wayne Parker by Mr. Colom. J.S. App. 134-136.

Only the district court knew if the election changes contained in its August 2 order reflected the "policy choice of . . . elected representatives," and that court answered in the negative.

Clearly, the district court, not the parties, determined what election law changes were necessary, and §5 of the Voting Rights Act is, therefore, not applicable. *McDaniel v. Sanchez,* 452 U.S. 130 (1981).

Assuming for the sake of argument only that paragraph 5 of the August 2 Order is subject to §5 approval, appellees contend that this Court may allow these election changes to be utilized without §5 preclearance.

In *Georgia v. United States,* 411 U.S. 526 (1973), the district court held that §5 preclearance had not been obtained and enjoined the pending election. This Court, however, allowed the election to go forward. After considering the resulting appeal, this Court affirmed the district court but did not invalidate the elections held under the unprecleared plan. *Also see: United States v. County Commission, Hale County,* 425 F.Supp. 433 (S.D. Ala. 1976) (three-judge court), aff'd mem., 430 U.S. 924 (1977) (district court permitted election under an unprecleared plan and directed that those elected would serve provisionally).

In *Clark v. Roemer,* ___ U.S. ___ (1991), 59 U.S.L.W. 4583 (July 3, 1991) this Court indicated that unprecleared election laws could be utilized under certain conditions. The Court stated:

> We need not decide today whether there are cases in which a District Court may deny a §5 plaintiff's motion for injunction and allow an election for an unpre-

> cleared seat to go forward. An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election *and there are equitable principles that justify allowing the election to proceed.* (emphasis supplied).
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> 59 U.S.L.W. at 4585.

In this case "there are equitable principles that justify allowing the elections to proceed" even if the election changes in paragraph 5 of the August 2 Order require §5 preclearance.

Additionally, the election changes contained in the August 2 order do not have any potential for discrimination and are not subject to §5. *Georgia v. United States,* 411 U.S. 526, 534 (1973); *Dougherty County Board of Education v. White,* 439 U.S. 32, 42 (1978). In *NAACP v. Hampton County Election Commission,* 470 U.S. 166 (1985) this Court once again determined that the inquiry confronting local district courts faced with §5 coverage questions was whether such change had the potential for discrimination. In so holding, the Court stated:

> More fundamentally, it is not our province, nor that of the District Court below, to determine whether the changes at issue in this case in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. That task is reserved by statute to the Attorney General or the District Court for the District of Columbia. Our inquiry is limited to whether the challenged alteration has the *potential* for discrimination. The changes effected here did have such *potential* and therefore should have been precleared under §5. (emphasis supplied).
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> 470 U.S. 166 at 181.

Appellants specifically requested in the district court "that the deadlines regarding absentee balloting should be extended," J.S. App. 76, and appellants' cross-examination of Wayne Parker on July 31 further illustrated appellants' desire to make it easier to vote by absentee ballot. J.S. App. 134-136. Appellants specifically suggested to the district court two modifications of state law concerning absentee ballots, J.S. App. 77, and, these suggestions ultimately appeared in paragraphs 5(b) and 5(c) of the lower court's August 2 order. J.S. App. 6.

It was only when the appellants raised their §5 challenge to the election changes embodied in the August 2 order that they, on August 30, first asserted that "making it easier to vote by absentee ballot would have the potential for discrimination against black voters," J.S. App. 87. Appellants are precluded from making this potential for discrimination argument because of their prior urging that the lower court adopt modifications that would make voting by absentee ballot easier and more accessible to the voters.

The modifications to state election procedures contained in the August 2 order do not have the potential for discrimination and are not subject to §5.

This issue is not substantial, especially considering that the election modifications were only used for the September 17, 1991 primary, and the lower court did not abuse its discretion in modifying election procedures for use only in the September 17 primary. *Brown v. Chote, supra.*

CONCLUSION

For the reasons set forth above, appellees respectfully submit that this Court lacks jurisdiction over this appeal, or, in the alternative, that the questions posed are so unsubstantial

as to require no further argument. Accordingly, appellees request that this appeal be dismissed or that the orders of the district court be summarily affirmed.

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